IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

COMPANY PETITION NO. 195 OF 2004

In the matter of Companies Act I of 1956;

And

In the matter of Sections 391 and 394 of the Companies Act, 1956;

And

In the matter of Scheme of Amalgamation of MRC Autosolutions Private Limited

With

Cummins Auto Services Limited.

Cummins Auto Services Ltd. .. **Petitioner.**

Shri Virag V. Tulzapurkar with S. Samant i/b Mulla & Mulla & Craigie Blunt & Caroe for petitioner.

Shri C.J.Joy with R.C.Master, Panel counsel i/b T.C.Kaushik for Regional Director, Dept. of Company affairs, Maharashtra,Mumbai

CORAM: S.U.KAMDAR, J.

DATE : December 3, 2004

P.C. :-

1. Present petition is filed under section 391 r/w 394 of the Companies Act, 1956. The present petition is

presented by the Transferee company to obtain approval of this Court to the Scheme of Amalgamation of Transferor company with Transferee company.

2. The Regional Director, Western Region, Ministry of Company Affairs has filed affidavit dated 4th November, 2004 and raised two objections in paragraph No.4 and 5 thereof. In paragraph-4 of the said affidavit, it has been contended that M/s. Cummins Diesel Sales & Services (India) Limited being parent company of the petitioner should be directed to furnish bank guarantee towards liability of unsecured creditors. It is contended by the Regional Director that in paragraph-16 of the petition, the parent company i.e. M/s.Cummins Diesel Sales & Service (India) Limited has undertaken liability of the creditors or any other parties and therefore, said company should be directed to furnish bank guarantee. It has been contended that admittedly there is likelihood of negative networth because of amalgamation of two companies and therefore, it is necessary to furnish bank guarantee.

3. Mr.Tulzapurkar, the learned counsel appearing on behalf of the petitioner contended that it is not possible to give such bank guarantee because this protection which is approved under the resolution dated

24th December, 2003 does not form part of the scheme of amalgamation. It is an additional protection. Once it does not form the part of the amalgamation scheme, it is not open for the Regional Director to raise objections to such additional protection and demand bank guarantee for the purpose of such additional protection. I have considered argument of the rival parties and I am satisfied that the proposal contained in the resolution dated 24 December, 2003 do not form part of the scheme of amalgamation. The said M/s. Cummins Diesel sales & Services (India) Limited which is a holding company of the transferee company is not a party to the scheme. In any event, so far as creditors are concerned, they have been served notice of the scheme and they have raised no such objection.

4. In view thereof, I do not find any substance in the objection raised by the Regional Director in so far as paragraph 16 of the petition is concerned.

5. Second contention raised by the learned counsel for the Regional Director is that appointed date fixed under the scheme is 1/4/2003 as provided under clause 14 of the said scheme. It has been further contended that as on the date of 1/4/2003 the transferee company was holder of 50% of the shares of the transferor company.

It has been thus contended that the appropriate exchange ratio of the shares is required to be drawn for the purpose of allotment of new shares in respect of balance 50% holding. However it is not in dispute before me that subsequent to the appointed date i.e. 1.4.2003 on 10.6.2003, the transferee company has also acquired balance 50% shares of the transferor company. Thus on 10.6.2003 transferee company i.e. petitioner owns 100% subsidiary of the shares of transferor company. According to the Regional director a change in share capital structure subsequent to the appointed date is irrelevant because share ratio allotment has to be taken into account on the basis of share holding as on appointed date. The learned counsel for the petitioner has drawn my attention to the Judgment of Delhi High Court in the case of **HCL Ltd.,In re. and HCL Hewlett-packard Ltd., In re. reported in 1994 Vol.80 page 228** and has contended that there is distinction between the appointed date and effective date. According to the learned counsel for the petitioner, the scheme comes in operation as on date of the effective date and not from the appointed date. He also brought to my attention that under the scheme both the appointed date and effective date are separately defined and thus according to the learned counsel for the petitioner, entire scheme will come into operation from subsequent

date subsequent to the acquisition of the shares. It has been therefore, contended that on the effective date petitioner is holding entire share capital of the transferor company and therefore, there is no need of making any change in the scheme particularly in respect of exchange ratio of allotment of shares as contended by the Regional director.

6. The learned counsel for the Regional Director has drawn my attention to the page No.234 of the aforesaid Judgment and has contended that it has been well settled that the ‘appointed date’ is relevant for the purpose of fixation of the share valuation/share exchange rate. The learned counsel for the petitioner however, pointed that it is not possible to allot shares of petitioner company to itself. It is not possible to change exchange rate of shares as mentioned in the scheme because petitioner company now holder of entire capital of the Transferor company can not get shares of its own company and such a provision would be absurd. In the light of the aforesaid, the learned counsel for the petitioner states that there is no need of any alteration in the said scheme. In so far as second contention of the learned counsel for Regional Director, I am of the opinion that in so far as present scheme is concerned no exchange ratio of shares is required to be

changed once it is shown that petitioner company owns whole 100% share capital of the transferor company prior to the effective date, then in that event it is not permissible and it is not possible to allot shares to themselves by providing for exchange of existing shares under scheme of amalgamation. In my view such a provision in the scheme would result in absurd consequences not permissible by law. In view of the aforesaid discussion, I am not impressed by the contention raised by the Regional Director. I reject the same. Accordingly I pass following order.

1. Petition is made absolute in terms of prayer clause (a) to (e) of the petition.

2. The petitioner would pay costs of Rs.2,500/- to Regional Director.